SUPREME COURT, U.S.
FILED
APR 10 2003
CLERK

(2)

No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE,
GOVERNOR OF THE STATE OF WASHINGTON, *ET AL.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

WALTER M. WEBER
DAVID A. CORTMAN
AMERICAN CENTER FOR
LAW & JUSTICE
1650 Diagonal Road, 5th Floor
Alexandria, VA 22314
(703) 740-1450

RICHARD A. BERSIN
LAW OFFICE OF RICHARD
BERSIN
10500 N.E. 8th Street, Suite 1900
Bellevue, WA 98004
(425) 460-0090

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON, SR.
AMERICAN CENTER FOR
LAW & JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for Respondent

QUESTION PRESENTED

Where a State chooses to award scholarships based on neutral criteria to financially needy, academically gifted students, does the State violate the First and Fourteenth Amendments to the U.S. Constitution when it discriminatorily strips the scholarship from an otherwise eligible student for the sole reason that the student declares a major in theology taught from a religious perspective?

PARTIES

Petitioners correctly identify the parties. Pet. at ii. The petitioners were sued both in their individual and official capacities.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

ARGUMENT 2

I. NO CONFLICT WITH THE WASHINGTON SUPREME COURT WARRANTS REVIEW. 3

A. Recap of *Witters* litigation 4

B. *Witters* and the Washington Constitution ... 5

C. *Witters* and the Free Exercise Clause 7

II. NO CONFLICT WITH SUPREME COURT PRECEDENT WARRANTS REVIEW. 9

III. NO CONFLICT WITH OTHER FEDERAL CIRCUITS WARRANTS REVIEW. 10

IV. NO STATE CONSTITUTIONAL ISSUES WARRANT REVIEW. 15

V. THIS CASE IS AN ESPECIALLY POOR CANDIDATE FOR REVIEW. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Chittenden Town Sch. Dist. v. Department of Educ., 169 Vt. 310, 738 A.2d 539, *cert. denied*, 528 U.S. 1066 (1999) 15

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 8, 9, 11, 14, 16

Columbia Union College v. Clarke, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), *appeal after remand*, *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001) 10, 11, 12

Employment Division v. Smith, 494 U.S. 872 (1990) ... 8, 14

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 7

Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) 10

Malyon v. Pierce County, 131 Wash. 2d 779, 935 P.2d 1272 (1997) 5, 6, 8, 9

McDaniel v. Paty, 435 U.S. 618 (1978) 14, 16

Mitchell v. Helms, 530 U.S. 793 (2000) 13, 16

Native American Council of Tribes v. Solem,
691 F.2d 382 (8th Cir. 1982) 12

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 10-12

Romer v. Evans, 517 U.S. 620 (1996) 12

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995) 9, 11, 16

State ex rel. Gallwey v. Grimm, 146 Wash. 2d 445,
48 P.3d 274 (2002) 6

Strout v. Albanese, 178 F.3d 57 (1st Cir.),
cert. denied, 528 U.S. 931 (1999) 12-15

Tenafly Eruv Ass'n v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 14

Widmar v. Vincent, 454 U.S. 263 (1981) 7

Witters v. State Comm'n for the Blind,
102 Wash. 2d 624, 689 P.2d 53 (1984) (*Witters I*),
rev'd, 474 U.S. 481 (1986) 4, 5, 8

Witters v. Washington Dep't of Servs. for the Blind,
474 U.S. 481 (1986) (*Witters II*) 3, 4

Witters v. State Comm'n for the Blind,
112 Wash. 2d 363, 771 P.2d 1119 (1989)
(*Witters III*), *cert. denied*, 493 U.S. 850 (1989) . 3, *passim*

Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) 12, 13, 16

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. VI 7

U.S. Const. amend. I ..... 1, *passim*

U.S. Const. amend. XIV ..... 1, *passim*

OTHER AUTHORITIES

Green, *The Blaine Amendment Reconsidered*,
36 Am. J. Legal Hist. 38 (1992) 16

Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997) 16

Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*,
21 Harv. J.L. & Pub. Pol'y 657 (1998) 16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution provide as follows:

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The pertinent provisions of the Washington state constitution and state statutes and regulations are set forth in the petition. *See* Pet. at 1-2; Pet. App. 88a-106a.

INTRODUCTION

The State of Washington awarded respondent Joshua Davey a Promise Scholarship based on financial need and academic achievement. The state permits Promise Scholars to use this scholarship to defray educational expenses for the first two years of *any* course of study at *any* accredited college *except* if the recipient declares a major in theology taught from a religious perspective. When Davey declared a double major in Pastoral Ministries and Business Management and Administration, state law disqualified him from receipt of his Promise Scholarship.

The Ninth Circuit in this case correctly held that this blatant antireligious, viewpoint-based discrimination violates the Free Exercise Clause of the First Amendment (as incorporated through the Fourteenth Amendment) to the U.S. Constitution and that no state constitutional provision or statute justifies that federal constitutional violation. There is no need to review that decision in this Court.

ARGUMENT

The decision below properly conforms to governing Supreme Court precedent. Moreover, there is no conflict with other lower court decisions warranting review. This Court should deny certiorari.

The essential question is whether the state, having chosen to issue Promise Scholarships to economically needy, academically talented students attending accredited colleges, Pet. App. 8a-9a, can strip a scholarship from an otherwise eligible recipient, *id.* at 9a-10a, just because he announces his intention to "pursu[e] a degree in theology taught from a religious perspective," *id.* at 30a. This antireligious, viewpoint-based discrimination clearly offends the federal Constitution.

Petitioners have conceded that respondent Davey faces

discrimination targeting a religious viewpoint. The very premise of their exclusion of Davey from the Promise Scholarship program is that "Davey's coursework towards his Pastoral Ministries major was taught from a viewpoint that the Bible represents 'truth,' and is 'foundational,' as opposed to a purely academic study of the Bible." Appellees' Petition for Rehearing and Petition for Rehearing En Banc at 5 (9th Cir. July 30, 2002) (No. 00-35962). *Accord* Pet. App. 9a-10a; *id.* at 12a ("state policy excludes only those [scholarship] recipients who pursue the study of theology from a religious perspective"); *id.* at 15a, 22a, 30a. This concession alone suffices to doom the restriction as offensive to Davey's constitutionally protected rights to free speech, free exercise of religion, equal protection, and freedom from religious establishments.

Notably, the State does *not* defend its antireligious discrimination by invoking the federal Establishment Clause. Such a defense would in any event be meritless. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

I. NO CONFLICT WITH THE WASHINGTON SUPREME COURT WARRANTS REVIEW.

The centerpiece of the State's petition for certiorari is a purported conflict between the Ninth Circuit's decision below and the fourteen-year-old decision of the Supreme Court of Washington in *Witters v. State Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989) (*Witters III*). No such conflict warrants review. First, intervening decisions of this Court and of the state supreme court have undermined the *Witters III* decision, thereby eroding any such conflict. *Infra* § I(B), (C). Any claim that there is a current conflict is speculative and unripe. Second, any supposed lingering conflict between *state* constitutional law and *federal* constitutional law presents no

more than a well-settled question of federal supremacy.

A closer look at the *Witters* litigation and subsequent federal and state case law demonstrates the weakness of the State's asserted conflict.

A. Recap of *Witters* litigation

In *Witters*, the State of Washington denied vocational assistance to an otherwise qualified blind student merely because he pursued a degree in biblical studies. *Witters v. State Comm'n for the Blind*, 102 Wash. 2d 624, 626, 689 P.2d 53, 54-55 (1984) (*Witters I*). The state supreme court made three holdings. First, the court ruled that the federal Establishment Clause forbade state aid to a person studying to be a pastor, missionary, or church youth director. Second, the court held that this denial did not violate the federal Free Exercise Clause. And third, the court found that this denial did not violate the federal Equal Protection Clause. *Id.* at 627-32, 689 P.2d at 55-58.

This Court granted review and unanimously reversed the state supreme court. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (*Witters II*). This Court rejected the state supreme court's first holding, ruling instead that the federal Establishment Clause posed no bar to a neutral educational aid program that allowed recipients, by their own independent choice, to pursue religious studies. *Id.* at 485-89. The Court did not reach the state supreme court's second (Free Exercise) and third (Equal Protection) holdings. *Id.* at 489. Instead, this Court remanded for further proceedings. *Id.* at 489-90.

On remand, the Washington supreme court ruled that the *state* constitution barred the aid in question. *Witters III*, 112 Wash. 2d at 368-70, 771 P.2d at 1121-22. The court adhered to its prior conclusion that this denial did not offend the federal Free Exercise Clause. *Id.* at 370-72, 771 P.2d at 1122-23. The court

also reaffirmed that the denial did not offend the federal Equal Protection Clause.[1] *Id.* at 372-73, 771 P.2d at 1123-24.

B. *Witters* and the Washington Constitution

The State claims that the Supreme Court of Washington "continues to adhere to the principle in *Witters III* that the Washington Constitution prohibits using public funds to pay for religious instruction." Pet. at 12. This proposition of *state* constitutional law is dubious, at best, and -- more importantly -- totally irrelevant to the question whether the Ninth Circuit and the Washington supreme court conflict over the meaning of the *federal* Free Exercise Clause.

As to the dubiousness of the State's claim, one need only note the state supreme court's marked distancing of itself from *Witters III*'s strict separationist approach in subsequent decisions. In *Malyon v. Pierce County*, 131 Wash. 2d 779, 935 P.2d 1272 (1997), which upheld a county sheriff's chaplaincy program, the state supreme court barely cited the majority in *Witters III*,[2] indirectly criticized that decision for incorrect state constitutional analysis, *Malyon*, 131 Wash. 2d at 791 n.10, 935 P.2d at 1278 n.10, and instead cited the *dissents* in *Witters I* and *Witters III*, *see Malyon*, 131 Wash. 2d at 802 n.35, 803 n.37, 935 P.2d at 1283 n.35, 1284 n.37. Significantly, the *Malyon* court held that only appropriations with "a religious purpose" violate the state constitution. *Id.* at 799, 935 P.2d at 1282. Thus, under *Malyon*, a state scholarship program with a secular purpose -- like the assistance program in *Witters* and the Promise Scholarship program here -- would pass state constitutional muster. As the

---

[1]This Court denied review. *Witters v. Washington Dep't of Servs. for the Blind*, 493 U.S. 850 (1989).

[2]The court labeled its prior decision "*Witters II*," apparently not counting this Court's decision.

Malyon court explained, an "appropriation of money . . . to effectuate any objective other than worship, exercise, instruction, or religious establishment is not within the prohibition," regardless of any "[u]ltimate utilization of the money" for religious purposes. 131 Wash. 2d at 799-800, 935 P.2d at 1282. And in *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 48 P.3d 274 (2002), the court cited *Witters III*[3] only to distinguish it, *Gallwey*, 146 Wash. 2d at 467-68, 48 P.2d at 285, not to approve it, contrary to the State's claim, Pet. at 12.[4] Significantly, the *Gallwey* court held that *Malyon* governs educational assistance cases, *Gallwey*, 146 Wash. 2d at 470-71, 48 P.3d at 286-87, expressly rejecting the dissent's view that *Malyon* must yield to the stricter separationist precedents, including *Witters III*, in the educational context, *see Gallwey*, 146 Wash. 2d at 492-98, 48 P.3d at 297-300 (Chambers, J., dissenting).[5]

In short, by all indications the Supreme Court of Washington would not decide *Witters III* the same way today. While the state supreme court has not yet formally overruled *Witters III*, it has discarded its rationale. Thus, the asserted conflict with *state* constitutional law the State perceives here most likely does not

---

[3]Again, the state supreme court denominated the decision as *Witters II*. *See supra* note 2.

[4]The financial aid program at issue in *Gallwey* contained restrictions on religious programs even stricter than those at issue here. *See* 146 Wash. 2d at 453, 48 P.3d at 278. However, no challenge to those restrictions was before the court.

[5]The dissent cited *Witters III* as in accord with the older, more strictly separationist educational cases, and admitted that *Malyon*'s analysis "does not fit" with this prior line of cases. *Gallwey*, 146 Wash. 2d at 497, 48 P.3d at 300. The clear implication of both the majority and the dissent in *Gallwey* is that *Malyon* has superseded *Witters III* in educational assistance cases.

even exist; at a minimum, it would be premature and unripe to resolve such a hypothetical alleged conflict.

But more fundamentally, the question whether the Washington Constitution forbids the award of a Promise Scholarship to respondent Davey, while interesting as a matter of *state* constitutional law, is irrelevant to the question of respondent's *federal* Free Exercise rights. The Constitution expressly affords supremacy to federal constitutional rights over contrary state constitutional (and statutory) law. U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Not surprisingly, then, this Court has repeatedly rebuffed attempts to exalt state law over federal equal access claims. *See Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981); *Good News Club v. Milford Central School*, 533 U.S. 98, 107 n.2 (2001). Hence, the unlikely possibility that the Ninth Circuit's *federal* constitutional holding might conflict with the state supreme court's *state* constitutional interpretation is not a grounds for review here.

C. *Witters* and the Free Exercise Clause

The State's claim of a square conflict between the Ninth Circuit and the Washington supreme court on a point of *federal* constitutional law, namely, the meaning of the Free Exercise Clause, fares no better. A closer examination of the purported conflict severely undermines the State's claim.

The Ninth Circuit in this case held (correctly) that the discriminatory exclusion, of an otherwise eligible participant, from a state educational assistance program, just because the would-be participant intends to pursue a religious degree *from a religious perspective*, is a straightforward penalty for, and thus a violation of, the right to the free exercise of religion. The

Supreme Court of Washington, in *Witters I* and *Witters III*, essentially held the opposite. If that were the end of the story, the State might well claim a square conflict. But that is not the end of the story. Subsequent decisions of this Court and of the Washington supreme court severely undermine, indeed overrule, the federal free exercise holdings of *Witters I* and *Witters III*. To assume that the state supreme court *today* would nevertheless adhere to *Witters I* and *Witters III*, despite controlling, contrary, intervening case law, would be speculative at best, and disrespectful of the state judiciary at worst.

The federal Free Exercise analysis in *Witters I* was quite cursory. The state supreme court perceived no coercion in the denial of financial assistance and did not even consider whether the *discriminatory* denial of assistance, with *explicit* targeting of religion, raised Free Exercise concerns. *Witters I*, 102 Wash. 2d at 631, 689 P.2d at 57. The analysis in *Witters III* simply echoed this brief treatment. 112 Wash. 2d at 370-72, 771 P.2d at 1122-23.

The *Witters* decisions, however, predated this Court's rulings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In those two decisions, this Court made crystal clear that *express or purposeful discrimination against religious exercise as such* strikes at the core of the Free Exercise Clause. *See Smith*, 494 U.S. at 877; *Lukumi*, 508 U.S. at 532-33. In light of *Smith* and *Lukumi*, the *Witters* decisions are simply no longer good law.

The Supreme Court of Washington itself no longer adheres to the cramped *Witters* approach to antireligious discrimination. In *Malyon*, the court cited the *dissent* in *Witters III* on precisely the Free Exercise point, 131 Wash. 2d at 803 n.37, 935 P.2d at 1284 n.37, while opining that the discriminatory exclusion of ministers

or others openly professing their faith from a government program would run afoul of the "free exercise rights" of those would-be participants, *id.* at 802-03, 935 P.2d at 1283-84. *See also id.* at 809-10 & n.49, 935 P.2d at 1287 & n.49 (citing *Lukumi* and noting Free Exercise concerns with discrimination based on religious identity or conduct).

In sum, the purported conflict between the decision below and the fourteen-year-old *Witters III* decision is not a grounds for review because subsequent controlling case law has completely eroded the precedential status of *Witters III* on the pertinent issue. To assume that the state supreme court would now return to its erroneous ways in *Witters III*, despite the subsequent decisions of this Court and of the state supreme court itself, would be rank speculation. Moreover, such an assumption would fail to credit the state supreme court's obligation and ability to follow established federal law. The mere unlikely possibility that a state court could so err, on the issue at hand, does not present a concrete conflict ripe for review by this Court.

II. NO CONFLICT WITH SUPREME COURT PRECEDENT WARRANTS REVIEW.

Petitioners claim that the decision below conflicts with a line of Supreme Court cases holding that government need not underwrite the exercise of a right. Pet. at 15-17. The court below already dispensed with this contention. Pet. App. 12a, 17a-25a. That government need not pay for something in the first place does not mean it may deny funding in an invidiously discriminatory manner. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). According to petitioners' faulty logic, *Rosenberger* was wrongly decided, as the university simply sought not to underwrite evangelical speech. Indeed, under petitioners' view a city could charge churches,

synagogues, and other houses of worship -- but no one else -- special user fees for fire, rescue, and police services. Petitioners would perceive no unconstitutional discrimination, as the city would be merely "declining funding." Petitioners' analysis goes badly astray.

Petitioners cite *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (mem.), *see* Pet. at 21, but the *Luetkemeyer* case is inapposite. In *Luetkemeyer*, the state denied bus transportation to *all nonpublic* schools, whether religious or not. *See* 364 F. Supp. at 378. Thus, the state denied the benefit to students "because they are enrolled in a nonpublic school," *id.* at 381, *not* because they were enrolled in a nonpublic *religious* school. If Washington were to restrict Promise Scholars to state schools, *Luetkemeyer* might offer constitutional refuge for that restriction. But here, Washington discriminates on the basis of the religious viewpoint of the student's chosen major, not the public/nonpublic nature of the institution the student attends.

III. NO CONFLICT WITH OTHER FEDERAL CIRCUITS WARRANTS REVIEW.

Petitioners do not contend that there is a circuit conflict warranting review. Indeed, the decision below accords with decisions of the Fourth and Eighth Circuits. *See Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999), *appeal after remand*, *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

In the *Columbia Union College* litigation, the Fourth Circuit held that it violated the First Amendment[6] discriminatorily to

[6]The Fourth Circuit explained that it considered "as one constitutional (continued...)

exclude a potential recipient of state education grants (there, a religiously affiliated college) on the basis that the education was provided from a religious viewpoint. 159 F.3d at 154-56; 254 F.3d at 510.[7] There, state funds were given directly to religious colleges, 159 F.3d at 154, not to particular students. *A fortiori*, under the rule of *Columbia Union College*, respondent Davey in this case would prevail on his First Amendment claim.

In *Peter v. Wedl*, the Eighth Circuit held that it would violate the First Amendment[8] discriminatorily to deny a state-funded paraprofessional to a disabled grade-school child just because he attended a religious school. As the court explained, the state rule

> explicitly discriminated against children who attended private religious schools. While children who attended private nonreligious schools could receive government-funded special education services directly at their private schools, students like Aaron could not. Government discrimination based on religion violates the Free Exercise Clause of the First Amendment, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general"), the Free Speech Clause of the First Amendment, *see Rosenberger v. Rector*

[6](...continued)
inquiry" the various equal access arguments posed on grounds of free speech, free exercise, and equal protection rights. 159 F.3d at 155 & n.1.

[7]The principal disputed issue in the *Columbia Union College* litigation was the sufficiency of a federal Establishment Clause defense of the state's funding restriction. The Fourth Circuit ultimately found that defense meritless. 254 F.3d at 498-510. In the present case, petitioners do not even raise a federal Establishment Clause defense.

[8]Like the court in *Columbia Union College*, the *Peter* court invoked the free exercise, free speech, and equal protection guarantees of the federal Constitution. 155 F.3d at 996, 997.

and Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) ("ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts" (quotations omitted)), and the Equal Protection Clause of the Fourteenth Amendment. *See Native American Council of Tribes v. Solem*, 691 F.2d 382, 384 (8th Cir. 1982); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Equal protection of the laws is not achieved though indiscriminate imposition of inequalities. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (quotations and citations omitted)).

. . . .

> . . . Because [the state rule] cannot be justified as a narrowly tailored means of avoiding a violation of the Establishment Clause, it violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection, and the district court properly enjoined its enforcement.

155 F.3d at 996-97. Here, petitioners do not even raise a federal Establishment Clause defense. Under *Peter*, as under *Columbia Union College*, the merits of respondent Davey's claims follow *a fortiori*.

In sum, the decision below in this case is in harmony with the pertinent decisions of the other circuits.

In the court below, petitioners had invoked *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999), as supposedly conflicting with the decision in the present case. *Strout* is distinguishable, and no alleged conflict with *Strout* warrants review.

Strout, first of all, was essentially overruled in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002). *Strout* involved a Maine tuition reimbursement program authorizing grants to the school of a student's choice, except for religious schools. The *Strout* court perceived the Establishment Clause as forbidding the inclusion of religious schools in a government student-subsidy program. 178 F.3d at 60-64. This Court rejected that proposition in *Zelman*, which upheld the Cleveland school voucher program. Thus, the *Strout* court's Establishment Clause analysis cannot aid petitioners here.[9] Furthermore, *Strout*'s flawed Establishment holding also infected that court's analysis of other equal access arguments at issue there. *See* 178 F.3d at 64-65 (Establishment concerns foreclose students' Equal Protection claim); *id.* at 65 (Establishment concerns would justify any Free Exercise infringement). In short, *Strout* is no longer good law even in its own circuit.

Strout's Free Exercise analysis, moreover, supplies no convincing basis for reviewing the decision below in the present case. *Strout* noted that the denial of government funding there "does not prevent attendance at a religious school." 178 F.3d at 65. But a penalty on religious exercise need not take the form of

---

[9] *Strout* may also be read to stand for the narrower, more formalistic proposition that the Establishment Clause bars only the "direct payment of tuition by the state to a private sectarian school," 178 F.3d at 61 -- as opposed to direct payment to the *student*, who then signs the check over to the school, *Zelman*, 122 S. Ct. at 2464. Read this way, *Strout* is in tension with *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality) ("Although the presence of private choice is easier to see when aid literally passes through the hands of individuals . . . there is no reason why the Establishment Clause requires such a form"); *id.* at 818-19 & n.8 (same rule logically may apply to money grants). In any event, this narrower reading of *Strout* would render *Strout* irrelevant in the present case, where Promise Scholarships are paid to the *student*, not to the school. Pet. App. 104a (state schools are paid directly; nonstate schools are sent checks payable to the eligible students).

an absolute bar in order to be discriminatory and unconstitutional. If the city in *Lukumi* had merely imposed a discriminatory excise tax, instead of a prohibition, on the religious practices at issue, the discrimination would have been no less unconstitutional. Likewise, the discriminatory denial of otherwise generally available taxpayer-funded fire and police services only to religious houses of worship would be unconstitutional even if the congregation remained free to obtain the desired services by payment of a fee. *Strout* claimed there was no burden on religious exercise because the religious education at issue was neither required by nor central to the plaintiffs' religion. *Id.* But this Court has explicitly condemned inquiry into the "centrality" of religious practices, *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990), and inquiry into the "mandatory" nature of the practice is no less illegitimate, *see Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171-72 (3d Cir. 2002) (analyzing this Court's cases). Indeed, it is deeply offensive to suggest that government might defend the discriminatory treatment of those pursuing religious rituals (as in *Lukumi*) or vocations (as in *McDaniel v. Paty*, 435 U.S. 618 (1978)) by arguing that the religion in question did not *require* the penalized practice. *Strout* also cited a lack of "animus" on the part of the government. 178 F.3d at 65. But while "animus" might be relevant to proving that a seemingly neutral law is in fact discriminatory, as in *Lukumi*, 508 U.S. at 534, it is not a required element of a Free Exercise violation where the law is facially discriminatory, as in *Strout* (and in the present case). *Lukumi*, 508 U.S. at 534 ("the minimum requirement of neutrality is that a law not discriminate on its face"). The categorical disqualification of parochial (but not other private) high school graduates from eligibility for the local police academy, for example, would be unconstitutional no matter how

assertedly benign the alleged motivation for the discrimination.

In short, *Strout* is replete with legally erroneous analysis. Even if it were not distinguishable, it would offer no sound basis for reviewing the lower court's correct analysis in the present case. But *Strout* is in any event distinguishable, as it involved high school, not college; tuition payments, not general educational expense payments; direct payments to schools, not to students; and a restriction tied to the nature of the school, not to the viewpoint of the specific program.[10]

There is no circuit conflict warranting review.

IV. NO STATE CONSTITUTIONAL ISSUES WARRANT REVIEW.

Petitioners protest that the Ninth Circuit's decision in this case calls into question the "Blaine" amendments of other states. Pet. at 18-23. To the extent such Blaine amendments *require affirmative antireligious discrimination on the basis of religious viewpoints* (a question of state law for each state to resolve), these amendments are indeed in constitutional jeopardy, and rightly so. But this follows, not just because of the decision in this case, but rather because of the important First Amendment

---

[10]By no means does respondent mean to suggest that these distinctions make *Strout* defensible; only that they make the case legally distinguishable.

The state supreme court case of *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 738 A.2d 539, *cert. denied*, 528 U.S. 1066 (1999), which follows *Strout*, *see* 169 Vt. at 343-44, 738 A.2d at 563 (rejecting similar Free Exercise claim), is distinguishable for the same reasons as *Strout*. *Chittenden*, moreover, is internally incoherent. *See* 169 Vt. at 344-45, 738 A.2d at 563-64 (acknowledging that denial of government benefit because of religiously motivated choices implicates Free Exercise Clause, but holding that denial of state educational assistance only where private education incorporates "religious worship" "does not implicate the Free Exercise Clause").

principles upheld in cases like *Rosenberger*, *Lukumi*, and *McDaniel*, principles which the court below properly applied to the present case. In any event, it is particularly unpersuasive to appeal to Blaine Amendments as grounds for restricting federal constitutional rights. These Blaine Amendments were products of a wave of nativist, anti-Catholic bigotry. *See* Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 659, 669-75 (1998); Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 50-53 (1997); Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 41-67, 69 (1992). A majority of this Court has acknowledged the Blaine Amendment's origin in this shameful episode of American history. *Mitchell v. Helms*, 530 U.S. at 828 (plurality of Thomas, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.); *Zelman v. Simmons-Harris*, 122 S. Ct. at 2504 (dissent of Breyer, J., joined by Stevens and Souter, JJ.). Petitioners' concern, that striking down one instance of antireligious discrimination may endanger other products of 19th Century antireligious bigotry, provides no legitimate basis for review.

V. THIS CASE IS AN ESPECIALLY POOR CANDIDATE FOR REVIEW.

As demonstrated above, there is no warrant for review here. The facts of the present case, moreover, make this case an especially poor vehicle for reconsidering a ruling in favor of respondent Davey.

Petitioners sound the alarm that the court below is forcing a state to pay for religious education. This is a serious mischaracterization of the real issue, which is: If a state chooses to award scholarships on a neutral basis to financially needy, academically gifted college students, may it discriminatorily strip

the scholarship from a student just because that student declares a major in a religious subject taught from a religious viewpoint? The court below correctly held such discrimination unconstitutional. The facts of this case, moreover, highlight the utter irrationality of the challenged state restriction on Promise Scholarships.

First, the *courses* a Promise Scholar actually takes are irrelevant to the state. What matters is the *major* a student declares. ER[11] 38:9, 54. A Promise Scholar could take numerous theology courses, paid for by state grants, so long as his major was something else (like psychology or math). Contrariwise, a student's declared intent to major in theology bars that student from a Promise Scholarship even if the student takes nothing but language, literature, philosophy, and science courses during the first two years of college (the only years the Promise Scholarship covers, Pet. at 3-4; Pet. App. 8a).[12]

Second, the criterion penalizes the *declaration* of a major, ER 68:4, not the major itself. A Promise Scholar who refrains until the third year of college from declaring a major -- or who sincerely declares a major in some other subject but switches to (or adds as a double major) theology in the third year -- is eligible for a Promise Scholarship. ER 38:37-38. *See also* ER 41:24 (need not declare major during first two years of study). But a student who declares a (theology) major early is barred

---

[11]"ER" refers to the Excerpts of Record in the Ninth Circuit.

[12]The petitioners' statement of the question presented, therefore, is misleading. The issue is not the refusal of the state "to fund religious instruction," Pet. at i, or even instruction from a religious viewpoint. The State allows Promise Scholars to use grant money to pay for religious instruction, including from a religious viewpoint, so long as it is not part of a declared major. The actual question presented, then, is that stated herein, *supra* p. i. *See also supra* p. 2 (identifying the "essential question").

from the scholarship, even if he later decides to switch to economics or philosophy.

Third, the open pursuit even of a religious studies *major* is not excluded unless the courses are *taught* from a religious perspective. *Supra* pp. 2-3. A would-be minister is free to use a Promise Scholarship to major in religion at a private secular college or a state college, even though the student does so with every intention of approaching the topic as a devout believer openly planning to pursue a religious vocation. Contrariwise, a theology major with no religious faith and no desire to be a minister, who majors in theology as preparation for an academic teaching career in state schools, is barred from receipt of a Promise Scholarship if -- but only if -- the major is taught from a religious point of view.

In sum, the challenged state rule -- barring only first- and second-year *declared majors* in theology *taught from a religious perspective*, regardless of actual courses studied, regardless of ultimate major or career plans, and regardless of whether the scholarship is even used for tuition (as opposed to other educational expenses, Pet. App. 8a, 91a, 94a (funds may be used for room and board)), is so poorly tied to any supposed state interest in "separation of church and state" as to be utterly arbitrary and irrational. Such a rule flunks constitutional review even under the most lenient of tests.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

Walter M. Weber
David A. Cortman
American Center for Law and Justice
1650 Diagonal Road, 5th Fl.
Alexandria, VA 22314
(703) 740-1450

Richard A. Bersin
Law Office of Richard Bersin
Suite 1900
10500 N.E. 8th Street
Bellevue, WA 98004
(425) 460-0090

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
James M. Henderson, Sr.
American Center for Law and Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for Respondent

April 10, 2003